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No. 87-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

THOMAS R. DUFFY
Counsel of Record
RICHARD DESTEFANO
CAROLINE L. HUNT
243 El Dorado, Suite 201
Monterey, California 93940
(408) 649-5100

Attorneys for Petitioner

(Additional Counsel on inside cover)

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Attorneys for Petitioner (Cont'd.)
Of Counsel:

GLENN M. TAUBMAN
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

TODD G. BROWER
34821 Calle Del Sol
Capistrano Beach, California 92624
(714) 661-1886

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REPLY BRIEF FOR PETITIONER

In our opening brief, we showed that federal district court jurisdiction over duty of fair representation cases is an essential element in a collective bargaining system which grants exclusive representation powers to unions, regardless of whether the unions operate in the federal sector, private sector, railway sector, or postal sector.[1] Respondent and *amici* have failed to present any cogent reason to believe that Congress intended to bar access to

[1] Commentators agree. T. Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361, 364 (1987); Note, *Federal Employees, Federal Unions, and Federal Courts: The Duty of Fair Representation in the Federal Sector*, 64 Chi.-Kent L. Rev. 271, 273 (1988).

the federal courts to federal sector employees injured by their unions, or that Congress intended federal sector duty of fair representation actions to reach diametrically opposed results from the private sector precedents established long ago by this Court in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), and *Vaca v. Sipes*, 386 U.S. 171 (1967).

1. Congressional Intent

The question before the Court is whether Congress, when it established federal sector collective bargaining under the CSRA, intended to depart from *Steele* and *Vaca* and instead intended to preclude a judicial forum for federal sector duty of fair representation cases.[2]

In contrast to the authorities relied upon by respondent and *amici*,[3] the Court's present task is simplified because, in

[2] As the Court has repeatedly recognized, divination of congressional intent in an implied cause of action case can be a formidable task, particularly where there is a paucity of legislative history on the subject. While undoubtedly the better course for Congress to follow when a private cause of action is intended would be for it expressly to include that remedy in the statute, "the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374 (1981), *citing Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979).

[3] In *Thompson v. Thompson*, 484 U.S. _____, 108 S.Ct. 513 (1988) and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), the cases relied upon by respondent and *amici* to support their contention that Congress intended to alter the established private sector duty of fair representation, the Court was faced with substantial difficulty in ascertaining congressional intent to allow a private cause of action. For example, in *Touche Ross*, 442 U.S. at 562 n.2, the Court confronted legislation where no prior private cause of action existed when the statute was passed. In *Thompson*, 108 S. Ct. at 518, the Court dealt with an issue (Full Faith and Credit Clause cases) where the Court had traditionally refused to imply a private cause of action (unlike duty of fair representation cases). In

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passing Title VII of the CSRA, Congress was hardly writing on a blank slate.[4] Instead, Congress was legislating in an arena where the federal courts have traditionally fashioned judicial remedies for duty of fair representation actions. When Congress constructed a federal sector duty of fair representation modeled on the private sector paradigm, it drew upon over forty years of experience with this Court's development of implied judicial remedies in *Steele*, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944), and *Vaca*.

The legislative history demonstrates that Congress structured the federal sector duty of fair representation directly on the preexisting NLRA private sector model. Pet.Br. 18-22. "Congress adopted for government employee unions the private sector duty of fair representation." *National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1171 (D.C. Cir. 1986).[5]

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20-21 (1979), the Court found the requisite intent to be lacking when Congress created a series of express judicial remedies in companion legislation, but declined to do so in the statute under scrutiny. Similarly, in *California v. Sierra Club*, 451 U.S. 287 (1981), *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981), *Touche Ross, Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 92 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981), the Court declined to imply the necessary legislative intent, where the statute clearly was not enacted for the special benefit of the class to which plaintiff belonged.

[4] Respondent contends that Congress should have been more active in legislating express remedies as a result of the observations in then-Justice Rehnquist's concurring opinion in *Cannon*, 441 U.S. at 717. Resp.Br. 14. To the extent that this argument is persuasive, it loses much of its force due to the timing of the *Cannon* opinion, which appeared in 1979, *after* the Civil Service Reform Act of 1978 had been passed.

[5] Both respondent and the Solicitor General appear to agree that Congress intended to create in the CSRA the same duty of fair representation which existed in the private sector. Resp.Br. 4-5; Br. of the United States 9 n.4.

Where Congress consciously adopted the private sector model for this part of the federal sector collective bargaining system, and where for the past forty years this Court has repeatedly implied a private cause of action for breach of the duty of fair representation as a necessary corollary to the congressional grant of exclusive representation to the unions, Congress must be held to have incorporated the rule of *Steele* and *Vaca* into the CSRA. Substantial authority exists for this position in non-labor contexts also.

This Court has recognized implied private causes of action when Congress has acted in an area where a judicially implied cause of action exists in "related legislation prior to the subject statute's enactment, or of the same legislation prior to its reenactment...." *Thompson*, 108 S. Ct. at 520-23 (Scalia, J., concurring); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-85 (1983); *Merrill Lynch v. Curran*, 456 U.S. at 378-79; *Cannon*, 441 U.S. at 688-89; *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

Thus, the Court in *Herman & MacLean* unanimously upheld the continued existence of a well-recognized implied judicial remedy for violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), notwithstanding that Congress in 1975 "enacted 'the most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934'" (but was silent with regard to the propriety of the judicially implied cause of action under § 10(b)). 459 U.S. at 384-85. As the Court noted, "[i]n light of the well-established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action." *Id.* at 386.

In the same vein, the Court in *Cannon* discerned congressional intent to provide a private cause of action where

such a remedy had been well-recognized under a related statute. *Cannon* involved a sex discrimination claim under Title IX of the Education Amendments of 1972, which contained administrative enforcement mechanisms but no express private judicial remedies. The Court found Title IX patterned after Title VI of the Civil Rights Act of 1964, which included similar administrative mechanisms without providing any express private judicial remedy. 441 U.S. at 694. Reasoning that the enforcement schemes were intended to be the same under Title IX, the Court felt that Congress must have been aware of the judicially implied remedies found in Title VI, and thus intended no changes in the enforcement mechanisms when it enacted Title IX. 441 U.S. at 696-98. *See also Merrill Lynch*, 456 U.S. at 381-86.

The Court has often recognized that "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law." *Lorillard*, 434 U.S. at 581. On numerous other occasions, the Court has found similar congressional agreement with, and acquiescence in, judicially implied rights through congressional silence when Congress adopted, without altering, the statutes under which the rights had been implied.[6]

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[6] *See Norwest Bank Worthington v. Ahlers*, ____ U.S. ____, 108 S. Ct. 963 (1988) (Congress acted with awareness of judicial interpretation given to prior bankruptcy law); *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183, 200 (1984) (Brennan, J., concurring) (Court can look to judicial interpretations under prior immigration law to determine congressional intent); *Hillsboro National Bank v. Commissioner of Internal Revenue*, 460 U.S. 370, 402 (1983) (Congress' failure to mention a long-standing judicial interpretation of the Internal Revenue Code when it overhauled the code in the Economic Recovery Tax Act of 1981 indicates Congress' acquiescence in the former judicial interpretation).

Herman & MacLean and *Cannon* are directly analogous to the instant case. In the duty of fair representation area, as in those cases, the courts have consistently found an implied private cause of action. There is no indication in the legislative history involved in this case, or in *Herman & MacLean* and *Cannon*, that Congress intended to reach different results where the implied private cause of action is concerned, despite the presence of administrative remedies. Here, as in *Cannon*, Congress imported the preexisting statutes' rights and administrative mechanisms without any suggestion of an intent to omit the implied companion judicial remedies. As in *Herman & MacLean*, Congress' decision to leave the duty of fair representation intact supports congressional ratification of the holding in *Vaca* for federal sector employees.

Respondent's counter-arguments are inapposite. *United States v. Fausto*, 484 U.S. _____, 108 S. Ct. 668 (1988), arose in a context very different from that of the instant case. Although it involved interpretation of the CSRA, *Fausto* did not address the duty of fair representation and collective bargaining system modeled on the NLRA.

Instead, *Fausto* was concerned with whether a "non-preference eligible" in the excepted service could judicially challenge an adverse personnel action, where the applicable CSRA provisions specifically provided such remedies to "preference eligibles" only. *Id.* at 671. The Court noted that Congress had explicitly enacted certain protections as to specified nonpreference excepted employees, but not as to others, and that the distinctions made by the CSRA between preference, nonpreference and competitive service employees merely continued the traditional civil service system. *Id.* at 672-73. Under these circumstances, the Court readily inferred congressional intent to differentiate between the remedies available to excepted service non-

preference eligible employees and competitive service employees. *Id.* at 673-74. These facts bear little resemblance to the case at bar, where no discernible congressional intent to exclude petitioner from a judicial remedy exists.

Moreover, *Fausto* involved one of the myriad and haphazard avenues available for challenges to adverse personnel actions which the CSRA was expressly designed to replace. *Id.* at 671-72. In Title VII of the CSRA, Congress superseded those haphazard appeal rights with the collective bargaining and exclusive grievance procedures so familiar in the NLRA. S. Rep. No. 969, 95th Cong., 2d Sess. 3, 10 (1978); Pet.Br. 41-42. In contrast, the duty of fair representation is an area where Congress intended to import, not displace, private sector law. *E.g.*, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 41; S. Rep. No. 969, 106; *National Treasury Employees Union v. FLRA*, 800 F.2d at 1169.

The Solicitor General and *amicus* NTEU suggest that the duty of fair representation confers no benefit on the class to which petitioner belongs, thereby precluding a judicial remedy. Br. of the United States 14-15; NTEU Br. 10. This position is untenable. This Court has already recognized that the duty of fair representation is one of the classic examples where the plaintiff is "one of the class for whose *especial* benefit the statute was enacted." *Cannon*, 441 U.S. at 688, 690 n.13 (referring specifically to *Steele* and *Tunstall)*; *accord*, Note, 64 Chi.-Kent L. Rev. at 312-14.

2. History and Structure of the CSRA

When the private sector duty of fair representation was adopted in the federal sector, nothing in the language, structure, or legislative history of the federal sector duty of fair representation manifested congressional

intent to reject the holdings of this Court in *Steele*, *Tunstall*, and *Vaca*. Indeed, Congress was well aware of the Court's landmark decisions in these cases, and ratified the Court's recognition that a judicial forum was essential for employees injured by their exclusive bargaining representative.

a. Reading only respondent's brief, one would assume that the collective bargaining enforcement provisions in the CSRA and the NLRA are radically different. Resp. Br. 22. Respondent fosters this misunderstanding by avoiding a discussion of the key similarities pointed out in petitioner's opening brief, which indicate that the duty of fair representation is to be handled identically under both statutes. Pet.Br. 19-21. *Nowhere* does the statutory scheme suggest that the federal sector duty of fair representation, codified at 5 U.S.C. § 7114(a)(1), departs from private sector principles, or countenances any lesser or different duty than that imposed in the private sector.[7]

Respondent ignores the fact that, like their private sector counterparts, federal employee unions are the exclusive representatives of all workers in the bargaining unit. 5 U.S.C. §§ 7111, 7114. They alone have the right to bargain collectively with an employer (5 U.S.C. § 7114(a)(4)); they alone develop and control grievance procedures (5 U.S.C. § 7121(a)(1)); and they alone have access to binding arbitration (5 U.S.C. § 7121(a)(1)). Indeed, given the virtually identical grant of exclusive representational sta-

[7] The observation of respondent and *amici* that the language of § 7114(a)(1) was drawn from the superseded Executive Order (Resp.Br. 9 n.1; Br. of the United States 21-22) is not persuasive. Under the Executive Order, the duty to represent fairly all employees in a bargaining unit referred to the parallel obligation in the private sector (*e.g.*, *Tidewater Virginia Federal Employees Metal Trades Council/Int'l Ass'n of Machinists, Local No. 441*, 8 F.L.R.A. 217 (1982); *see also NTEU, Chapter 202*, 1 F.L.R.A. 909 (1979)), an obligation which in the private sector has been judicially cognizable since 1944.

tus to unions under the CSRA, 5 U.S.C. § 7111, the NLRA, 29 U.S.C. § 159(a), and the RLA, 45 U.S.C. § 152, Fourth, it would be difficult to imagine that the duties imposed upon federal sector unions to represent fairly the members of the bargaining unit could be any less significant than in the private sector. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976).

While respondent and the Solicitor General go to great lengths to point out the administrative enforcement mechanisms available for unfair labor practice charges before the FLRA (Resp.Br. 8-9; Br. of the United States 15-16), neither recognizes that *identical* administrative unfair labor practice remedies exist under the NLRA, and were found by this Court to be categorically inadequate in duty of fair representation cases. *Vaca*, 386 U.S. at 182-83; Pet.Br. 18-22. Similarly, Congress provided comparable appellate judicial review of both FLRA and NLRB unfair labor practice decisions.[8]

That Congress provided the same duty of fair representation in both statutes, practically identical language in

[8] As respondent correctly points out, circuit court review of arbitral decisions is *generally* precluded under 5 U.S.C. § 7123(a)(1) (Resp.Br. 16-17), which undoubtedly reflects the ability of the FLRA to review arbitral decisions, while such review in the NLRA is left to the district courts. *Compare* 5 U.S.C. §7122 *with* 29 U.S.C. § 185.

However, respondent is simply wrong in asserting that "*any judicial review whatsoever*" of FLRA decisions involving arbitral awards is precluded. Resp.Br. 17. Respondent fails to mention that, in the same section, Congress created an express exception to this rule where unfair labor practices are concerned. 5 U.S.C. § 7123(a)(1). Appellate court review of FLRA orders regarding any arbitral award which "involves an unfair labor practice under section 7118 of this title..." in the federal sector thus parallels long-standing appellate court review of such matters in the NLRA context. *Compare* 5 U.S.C. § 7123(a)(1) *with* 29 U.S.C. § 160(f). There is no indication that where unfair labor practices are concerned, Congress retrenched in any respect from the private sector appellate court review mechanisms.

both statutes for enforcing unfair labor practices, and substantially parallel provisions for appellate court judicial review provides convincing—if not conclusive—evidence that Congress intended to treat the duty of fair representation in the federal sector exactly as it had been treated in the private sector for decades theretofore.

Respondent asserts that because arbitrability and challenges to arbitral awards involve particular issues of collective bargaining agreement interpretation, and because some limited types of duty of fair representation actions involve other, distinct questions of labor contract construction, federal court jurisdiction over all duty of fair representation actions "would be directly contrary to the judgments Congress made in framing CSRA Title VII." Resp.Br. 20. This reasoning is flawed.

First, not all duty of fair representation cases involve breach of contract claims. Some suits entail an examination of union negotiating positions (*e.g.*, *Steele*) or other non-contract breach matters. *E.g.*, *CWA v. Beck*, ____ U.S. ____, 108 S. Ct. 2641 (1988). Even those duty of fair representation actions alleging union failures in grievance handling need not necessarily implicate labor contract violations. *E.g.*, *Hayes v. Consolidated Service Corp.*, 517 F.2d 564 (1st Cir. 1975); *Mumford v. Glover*, 503 F.2d 878 (5th Cir. 1974).

Second, substantive arbitrability and compulsion of recalcitrant employers or unions to abide by a contractual promise to arbitrate raise issues very different from those involved in duty of fair representation actions. The former topics are intertwined with the permissible scope of bargaining agreements and bargaining subjects. Accordingly, they implicate the negotiability determinations unique to the federal employee labor-management system (5 U.S.C.

§§ 7105(a)(2) and 7117), matters not normally presented by duty of fair representation suits. Congressional deferral of actions to compel arbitration and substantive arbitrability to the administrative agency presumably familiar with the scope of bargaining in the federal sector is unsurprising. *See* 5 U.S.C. §§ 7105(2)(D) and (E) and 7117; *NFFE v. Commandant, Defense Language Institute*, 493 F. Supp. 675, 679 (N.D. Cal. 1980).

Conversely, where unfair labor practices are concerned, Congress has evidenced no aversion to judicial review, even though an arbitral award is involved.[9] In the CSRA, Congress consciously rejected a continuation of the Executive Order system which had provided no role for the federal courts in the enforcement of federal employee labor relations. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983). Accordingly, Congress directly imported the NLRA concept of appellate review of unfair labor practices into the CSRA. *Compare* 5 U.S.C. § 7123(a)(1) *with* 29 U.S.C. § 160(f).

Third, respondent cites *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), and *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), to exemplify the type of

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[9] Indeed, "as remedial legislation, title VII [of the CSRA] is to be construed broadly to achieve its remedial purposes .... In the past, parties benefiting from remedial legislation have been able to enforce the remedial purposes even against the agency administering the legislation. We fully expect this to be the case with title VII as well. For this reason, we declined to bar judicial review of the remedial actions of the Authority." 124 Cong. Rec. H13,610 (daily ed. Oct. 14, 1978) (remarks of Rep. Ford introducing the Joint House-Senate Conference Bill). *See also* 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford) ("Judicial review is one of the primary benefits of a statutory program over an Executive Order, and to limit such review also limits the advantages of codification.")

issues Congress directed to the FLRA (Resp.Br. 15), thus asserting that Congress thereby intended to preclude the courts from serving as a forum for duty of fair representation cases. Resp.Br. 15-17. Despite the union's citation, the central focus of the *Steelworkers Trilogy* lay in the prevention of encroachment on the private dispute resolution mechanisms negotiated by unions and employers. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-50 (1986). Even the strong preference for arbitration articulated in the *Steelworkers Trilogy* must give way to the unique concerns of duty of fair representation actions. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 736 n.10 (1981), *citing Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 567. As such, the congressional decision to protect the employer-union arbitration system by an administrative agency (as in the CSRA) rather than by the courts (as in the NLRA) is inapposite. The fundamental premise of the duty of fair representation is that the individual employee's interests are not adequately protected by either labor-management institutions (the collective bargaining system and grievance procedures) or by the institutional players (the union, the employer, and the administrative agency) when the individual employee's interests diverge from the principal actors' goals.[10] *Vaca*, at 182-83; *Steele*, at 202-03.

b. Next, the structure and placement of the duty of fair representation provision, 5 U.S.C. § 7114(a)(1), suggest

[10] The Solicitor General's argument that the Merit Systems Protection Board provides an additional administrative remedy for employees in petitioner's position is wrong. Br. of the United States 27. Where the exclusive bargaining representative has bargained for, and achieved, a negotiated grievance procedure which is the exclusive avenue for redress of the employee grievances at issue, appeal to the MSPB under 5 U.S.C. § 7701 is not available. 5 C.F.R. § 1201.3(b) (1982); *Moreno v. Merit Systems Protection Bd.*, 728 F.2d 499, 500-01 (Fed. Cir. 1984).

that Congress did not intend to make the sole remedy for breach of the duty of fair representation an administrative unfair labor practice proceeding. Congress enumerated a long list of unfair labor practices in § 7116, but did not include the duty of fair representation. Instead, Congress placed the duty of fair representation in the section dealing with representation rights. *See* 5 U.S.C. § 7114. The duty of fair representation under § 7114(a)(1) is an unfair labor practice only to the extent that it happens to fall within the general "catch-all" unfair labor practice provisions of § 7116(b)(8).[11] The segregation of the duty of fair representation from traditional unfair labor practices in the CSRA may well indicate congressional recognition of "the unique interests served by the duty of fair representation doctrine" which this Court in *Vaca* found mandated court jurisdiction over such claims despite administrative agency unfair labor practice remedies. 386 U.S. at 181-82.

c. In passing the CSRA, Congress was not announcing a radical departure from the principles enunciated in *Vaca* and *Steele*. The legislative history supports this view.

[11] Significantly, while the legislative history treats at some length the issue of what will be considered an unfair labor practice, *e.g.*, S. Rep. No. 969, 105-06, there is no indication in the legislative history that a breach of the duty of fair representation would be treated as an unfair labor practice. Indeed, the House's only explanation for the catch-all provision of § 7116(b)(8) is that it was intended to include failure of a union to comply with a final order of the FLRA in an unfair labor practice proceeding. H.R. Rep. No. 1403, 50. There is no legislative mention of using this catch-all provision to enforce duty of fair representation breaches as unfair labor practices. Moreover, the only reference to the duty of fair representation in the congressional debates on the CSRA appears in the context of countering exclusive union power. 124 Cong. Rec. H13,609 (daily ed. Oct. 14, 1978) (remarks of Rep. Ford). Accordingly, there is little legislative history support for the opposition's claim that Congress intended unfair labor practice actions to be the *sole* remedy in duty of fair representation cases.

As the Solicitor General accurately notes, "[n]o statement made in the legislative history of the CSRA speaks directly to the question presented here." Br. of the United States 17. However, the Solicitor General opines that judicial cognizance of duty of fair representation actions would upset the "carefully crafted" scheme of unfair labor practice enforcement in the CSRA. *Id.* He bases this contention first on the fact that the FLRA General Counsel has the final decision on whether to issue an unfair labor practice complaint. *Id.* at 18. This is simply the private sector model, as Congress recognized during the CSRA debates. Pet.Br. 20.

The Solicitor General then asserts that, since unfair labor practice complaints are intended to be "channeled" through the FLRA, Congress intended to foreclose federal employees injured by their unions from a judicial forum.[12] Br. of the United States 18; *see* Resp.Br. 7, 23. In support of his position, the Solicitor General quotes two congressional reports to the effect that privately unresolved unfair labor practices will be filed with the FLRA (S. Rep. No. 969, 107) and that the FLRA General Counsel will decide when to issue an unfair labor practice complaint. H.R. Rep. No. 1403, 52; Br. of the United States 18. The Solicitor General asserts that "[t]his legislative history is difficult to reconcile with recognition of a private cause of action for enforcement of the duty of fair representation." Br. of the United States 19.

[12] These "channeling" suggestions are not unique to the CSRA, but have their direct equivalents in the Court's NLRA preemption jurisprudence under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Even in the face of the strong *Garmon* preemption doctrines, the same channeling arguments were considered in *Vaca* and rejected, as the Court found that duty of fair representation issues were a necessary exception to the application of the *Garmon* rules. 386 U.S. at 178-84; *see also* Brief for United States as *Amicus Curiae* in *Vaca* 13-14; Brief for AFL-CIO as *Amicus Curiae* in *Vaca* 22.

The Solicitor General's cursory examination of the legislative history utterly ignores the context of the congressional snippets presented. All that these citations demonstrate, when considered in context with the rest of the Senate report (S. Rep. No. 969, 106), is that Congress intended the FLRA to have the same authority in the area of federal sector unfair labor practice complaints that the NLRB has in the private sector. This conclusion supports petitioner's argument that Congress utilized the private sector model in designing the federal sector duty of fair representation, a concept which necessarily includes a judicial forum for duty of fair representation claims under *Steele* and *Vaca*.[13] Pet.Br. 19-20.

Respondent argues that the legislative history evidences a congressional compromise, with "the House [accepting] the Senate's decision to keep the courts essentially out of the business of considering disputes under collective bargaining agreements by foreclosing access to the courts either to compel arbitration or to obtain review of FLRA decisions on exceptions to arbitral awards." Resp.Br. 19. Respondent's position is based upon a largely mistaken view of the Senate's "decision" here.

The joint conference hearings cited by respondent (Resp.Br. 19 nn.14-15) indicate that the conferees were

[13] Petitioner has never suggested that Congress "simply borrowed" the text of the CSRA from some other statute, nor has petitioner advocated the wholesale importation of private sector labor law into the CSRA. Resp.Br. 21, 23. Rather, petitioner has utilized an approach similar to that employed by the Circuit Court for the District of Columbia, *e.g.*, *National Treasury Employees Union v. FLRA*, *supra*; *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987); *National Treasury Employees Union v. FLRA*, 826 F.2d 114 (D.C. Cir. 1987), which recognizes the private sector parallels in the CSRA where appropriate and deviates from them where the CSRA contains provisions unique to the federal sector. Pet.Br. 34-36.

only concerned with the narrow grant of FLRA authority to decide arbitrability issues. House-Senate Conference on S. 2640 (Sept. 27, 1978), at 51-52. There was no indication that the conferees wished to give federal employees fewer protections than private sector employees. *Id.* (Sept. 21, 1978), at 32-33 (remarks of Rep. Spellman). Moreover, where unfair labor practice decisions were concerned, the Senate clearly wanted judicial review of FLRA awards.[14] Contrary to respondent's assertion (Resp.Br. 19 n.13), Congress essentially adopted the Senate's position by codifying appellate review of FLRA orders involving unfair labor practice charges, even where an arbitral award has been made. 5 U.S.C. § 7123(a)(1).

In short, the CSRA unfair labor practice enforcement machinery is no different from the private sector system—the very structure which this Court determined inadequate to protect an individual employee's fair representation rights in the absence of access to a judicial forum. *Vaca*, 386 U.S. at 182-83.

3. Policy Considerations

The logic and rationale of *Steele*, *Vaca*, *Hines*, and *Bowen v. United States Postal Service*, 459 U.S. 212

[14] The Stevens amendment proposed the same appellate review for federal sector unfair labor practice decisions accorded NLRB unfair labor practice decisions. Senator Stevens' comments in this regard are unequivocal:

> An unfair labor practice is basically the same, whether it is brought before the Federal Labor Relations Authority or the National Labor Relations Board. The only difference is in one case the employer is the Government, in the other it is private industry.
>
> Mr. President, my amendment will provide for judicial review of Federal Labor Relations Authority decisions as they concern unfair labor practices. The review will be similar to that of the Merit System Protection Board's and the National Labor Relation Board's.

124 Cong. Rec. S14,322 (daily ed. Aug. 24, 1978) (remarks of Sen. Stevens).

(1983), compel federal court jurisdiction for federal sector duty of fair representation cases. As the duty of fair representation has evolved, this Court has repeatedly recognized that concomitant with the congressional grant of the extraordinary power of exclusive representation is the duty of fair representation. *DelCostello v. Teamsters*, 462 U.S. 151, 164 n.14 (1983); *Hines*, 424 U.S. at 564, *citing Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Vaca*, 386 U.S. at 182, *citing Steele*, 323 U.S. at 198-99. Given the potential abuse which a tyrannical exclusive representative could wreak on the careers of dissident minority employees, those employees must be provided an *unconditional* opportunity to protect themselves in a judicial forum, not merely one dependent upon the "unreviewable discretion" of the General Counsel. *Vaca*, 386 U.S. at 182-83; *see NLRB v. United Food and Commercial Workers Union*, 484 U.S. ——, 108 S. Ct. 413 (1987).

Respondent attempts to obscure the fundamental reason for the four-decade existence of a judicial forum for duty of fair representation cases by asserting that this Court's concern for protecting individual employees (the *raison d'etre* of *Vaca* and *Steele*) is practically irrelevant because it "was *not* stated [in *Vaca*] as an *independent* ground for preserving the ... fair representation cause of action...." Resp.Br. 31 (emphasis in original). Respondent's argument completely ignores the Court's decisions in the decades since *Vaca*, which expressly recognize that judicial oversight of duty of fair representation cases is a necessary implication of the grant of exclusive representation status. *E.g.*, *DelCostello*, 462 U.S. at 164 n.14.

Respondent and the Solicitor General contend that the FLRA has primacy over the creation of duty of fair representation law, and advance the notion that it is necessary to avoid conflicting decisions between the courts and the administrative agency. Br. of the United

States 19-20; Resp.Br. 33-34. However, the Court in *Vaca* rejected the very contention that these factors counseled in favor of closing the federal courts to injured employees. 386 U.S. at 181; *see* Brief of the AFL-CIO in *Vaca* at 22; Brief of the United States in *Vaca* at 16.

Moreover, the FLRA and its predecessor agency, the FLRC, have routinely looked to the expertise of the federal courts and judicial decisions under the National Labor Relations and Railway Labor Acts to resolve the duty of fair representation claims of federal employees. *NFFE, Local 1453 (Crawford)*, 23 F.L.R.A. 686 (1986); *AFGE, Local 987 (Nedra Bradley)*, 3 F.L.R.A. 714 (1980).

There is certainly no reason to believe that the FLRA, as an administrative agency, is any better equipped than the NLRB to focus on the relief to the individual employee in a duty of fair representation case.[15] "The

[15] In his discussion of the FLRA's settlement, the Solicitor General's recitation of the underlying facts is entirely incorrect. Br. of the United States 28 n.13. The General Counsel's reference to the "charged party" in his Nov. 24, 1980 letter was a reference to the *employer-agency* (not the *union* as the Solicitor General asserts at page 28 n.13 of his Brief). The letter was only directed to the unfair labor practice charge against the employer-agency, and had nothing to do with the unfair labor practice charge against the union. *Compare* First Amended Complaint, Ex. 15 *and* Ex. 16 *with* First Amended Complaint, Ex. 19.

The Solicitor General's suggestion that the FLRA's settlement of the unfair labor practice charge against the respondent was "reasonable" is not persuasive (Br. of the United States 28 n.13), as the district court's findings in this regard are the subject of petitioner's cross-appeal, which has not been decided. In this regard, petitioner believes that the respondent's continuous breaches of the duty of fair representation destroyed the integrity of the testing process, such that the tests of the employees could not be meaningfully compared (a conclusion apparently shared by the district court, JA at 95 n.11). Petitioner believes that under these circumstances, where the respondent's actions caused or contributed to the difficulty in making the necessary comparisons, any uncertainty should be resolved against the respondent. *E.g., Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 345 (5th Cir. 1980).

fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights.... [R]elief in each case should be fashioned to make the employee whole." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 49 (1979), *citing Steele*, 323 U.S. at 206-07. The right of the employee injured by his union's actions to be made whole is "[o]f paramount importance." *Bowen*, 459 U.S. at 222. Without a judicial forum this right is jeopardized, as the FLRA General Counsel has the same unreviewable discretion to bring, dismiss, or settle a case (even over the objection of the employee) which the NLRB General Counsel enjoys, and which was so troubling to the Court in *Vaca*. 386 U.S. at 182.

Respondent contends that *Vaca* is inapplicable in the federal sector because there was no preexisting judicial remedy for duty of fair representation cases under the Executive Order. Resp.Br. 31. The major problem with respondent's argument is that it ignores the fact that Congress unquestionably intended to revamp federal sector collective bargaining when it passed the CSRA. *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92. The appropriate inquiry should thus be directed to the scope of remedies available under the private sector model upon which the duty of fair representation was based, and not to the system which Congress intended to change.[16]

The argument that the need to provide a bulwark against abusive union actions in the federal sector is lessened because federal employment has historically been by appointment (Br. of the United States 27), fails to rec-

[16] The principal reason that the duty of fair representation imposed by the prior Executive Order was not directly cognizable in federal court was because the Order was not a "law of the United States" under 28 U.S.C. § 1331. *Kuhn v. National Ass'n of Letter Carriers*, 570 F.2d 757, 760-61 (8th Cir. 1978).

ognize that collective bargaining, not the appointment system, is the basis of Title VII of the CSRA. 5 U.S.C. § 7101(a); *see* Brower, 40 Okla. L. Rev. at 365-67, 371. Further, federal sector employment can result either from contract or appointment. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 735 (1982). Most importantly, regardless of the extent of bargaining rights, where the union controls the arbitration mechanism the potential for abuse of that power is just as acute as in the private sector.

CONCLUSION

The scope of the duty arising from the grant of power to a union as exclusive representative is the same in the federal sector as in the private sector. *National Treasury Employees Union v. FLRA*, 800 F.2d at 1171. The need to guard against abuses of that duty is equally compelling whether the union enjoys exclusive bargaining status in the private or federal sector. To paraphrase *Vaca*, the existence of cases like this, in which the FLRA would be unwilling or unable to remedy a union's breach of duty "would frustrate the basic purposes underlying the duty of fair representation doctrine." 386 U.S. at 182-83.

Petitioner submits that Congress must have assumed, and indeed did assume, that in the federal sector a judicial remedy would remain for employees injured by their exclusive representative, just as in the private sector.

Respectfully submitted,

Of Counsel:
GLENN M. TAUBMAN
TODD G. BROWER
Attorneys for Petitioner

THOMAS R. DUFFY
Counsel of Record
RICHARD DESTEFANO
CAROLINE L. HUNT